

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1926 of 2000

1.Muthusamy (Deceased) ... 1st Appellant/2nd Defendant

2.Mrs.Subbathal

3.Mrs.Chitra

4.Mr.Balasubramani ... Appellants 2 to 4

(Appellants 2 to 4 are brought on record as legal heirs of the deceased sole appellant vide order dated 05.02.2015 in C.M.P.No.103 of 2015 in S.A.No.1926 of 2000)

Vs.

1.Boomathy ... 1st Respondent/Plaintiff

2.Murugasamy ... 2nd Respondent/1st Defendant

3.Palaniammal (Deceased) ... 3rd Respondent/3rd Defendant

4.Saraswathy

5.Valliammal ... 4th and 5th Respondents

(Respondents 4 and 5 are brought on record as legal representatives of the deceased third respondent vide order dated 01.04.2016 made in CMP.306 to 308 of 2015 in S.A.No.1926 of 2000)

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 22.03.2000 passed in A.S.No.121 of 1999 by the learned II Additional District Judge, Erode, modifying the judgment and decree dated 19.07.1995 passed in O.S.No.78 of 1992 on the file of the Subordinate Judge, Dharapuram.

For Appellants : Mr.B.Easwaran
For 1st Respondent : Mr.S.Saravanan
For 2nd Respondent : Mr.A.K.Sridharan
R3 : Died
R4 & R5 : Not ready in notice

JUDGMENT

This second appeal has been filed against the Judgment and Decree dated 22.03.2000 passed in A.S.No.121 of 1999 by the learned II Additional District Judge, Erode, modifying the judgment and decree dated 19.07.2015 passed in O.S.No.78 of 1992 on the file of the learned Subordinate Judge, Dharapuram.

2.The second defendant is the appellant herein. The trial Court while allowing the suit for partition, had held that the alienation in favour of this appellant by the first defendant as valid transaction and excluded that portion of the property from partition. The first appellate Court omitted to determine the correctness of this finding and hence, this appeal.

3.The brief facts, which led to the filing of this second appeal, are as follows:

(i)The suit is for partition filed by the first respondent herein alleging that the suit properties are her ancestral properties. The first defendant, who is the father of the plaintiff, was the kartha of the family. He became addict to drink and driven away his wife and daughter from the matrimonial home on 10.01.1991. Therefore, the mother of the plaintiff, on her behalf and on behalf of her minor daughter filed O.S.No.198 of 1991 against the first defendant for maintenance and the said suit was compromised out of Court. Hence, the plaintiff's mother withdrew the suit. After some time, again, the first defendant driven away the plaintiff and her mother. The plaintiff came to know that her father, who is the first defendant, in order to cheat her, created documents alienating the ancestral properties and further found that he had entered into an agreement with one Muthusamy, who was impleaded as second defendant in the suit, in respect of two acres of land in Survey No.273. The said Muthusamy filed a suit for specific performance in O.S.No.129 of 1991. Due to amendment of the Hindu Succession Act, the plaintiff is also entitled to a share in the ancestral property. Therefore, she sought for partition. The first defendant

refused to give her share. Hence, she filed a suit for partition by metes and bounds of the suit schedule property.

(ii) The first defendant filed his written statement wherein, it is stated that in the suit schedule properties, item Nos.1, 2, 3, 4 and 7 are the ancestral properties and he denied the nature of the properties, which are shown as item Nos.5 and 6 of the suit properties. According to the first defendant, item Nos.5 and 6 of the suit properties are his self acquired properties and no one else has the right over the property. Item Nos.1, 2, 3, 4 and 7 of the suit properties were divided among the children of Angamuthu Gounder, who died 27 years ago. In the said division, the first defendant got 5/8 share in those properties and his mother and two sisters got 1/8 share each. On 18.07.1990, the sister of the first plaintiff relinquished her respective share in favour of the first defendant and her mother Palaniammal. By virtue of the release deed, the first defendant has 6/8 share and his mother Palaniammal has 2/8 share in the suit item Nos.1 to 4 and 7. Therefore, in respect of these items of the properties, Palaniammal is a necessary party who hold 2/8 share. Therefore, the suit is bad for non-joinder of Palaniammal.

(iii) In respect of item Nos.5 and 6 of the suit properties, which were purchased from the independent income of the first defendant. The mother of the plaintiff already initiated a partition suit in O.S.No.140 of 1991 on behalf of the plaintiff and the same was dismissed. Therefore for the very same relief, the plaintiff cannot file subsequent suit to claim ratio of the share and the same is not sustainable. Therefore, the suit has to be dismissed.

(iv) The second defendant, in his written statement, contended that the plaintiff and the first defendant are colluding together and filed the present suit to defeat his right. Insofar as the suit filed for specific performance is concerned, an agreement was entered into by the first defendant with him in respect of two acres out of 5.88 acres in Survey No.273. The Court has already decreed the suit filed for specific performance by him in O.S.No.129 of 1991 vide judgment dated 08.04.1992. Hence, the present suit is liable to be dismissed for res judicata and non joinder of necessary party. The third defendant, who is the mother of the first defendant, got herself impleaded in the suit and filed written statement subsequently to support the case of the first defendant, sought for dismissal of the suit.

(v) The trial Court, after considering the deposition of the respective parties and Exs.A.1 to A.3 and Exs.B.1 to B.5, has restricted the claim of the plaintiff to 2.5/8 share instead of

1/2 share and in respect of two acres of land sold to the second defendant, the trial Court has held that in the light of the decree passed in the suit for specific performance filed by the second defendant, his right need not be disturbed.

4.The first appellate Court omitted to discuss about the findings in respect of the two acres of land in item No.4 of the suit schedule property. Hence, this appeal is preferred by the second defendant.

5.At the time of admission, this Court has formulated the following substantial questions of law for consideration:

"Whether the lower appellate Court was right in including the properties released by co-sharers exclusively in favour of the respondents 2 and 3 into the common pool while dividing the properties by partition among the respondents?

2.Whether the lower appellate Court has correctly appreciated the decree obtained by the appellant under Ex.A.9?".

6.The trial Court while dealing with issue Nos.1, had observed as under:

"The sale agreement with the second defendant in respect of item No.4 of the suit schedule property is held valid. The second defendant is entitled for specific performance while effecting division of the suit properties. The Commisisoner shall take into all these alienation and apportionment the shortage in item No.6 to the plaintiff from the other items of the suit properties."

7.On considering the judgments of the trial Court and the first appellate Court, the contention of the appellants appears to be correct. While the trial Court has recognised the decree passed in the specific performance suit and protected the interest of the decree holder under Ex.A.9 in respect of two acres of the land purchased by him from the first defendant, the first appellate Court has not deliberated about it. This omission has caused apprehension in the mind of the appellant to prefer this appeal. This Court is of the opinion that it is the duty of the Court to disspell the apprehension since the observation of the trial Court in favour of the second defendant/appellant is omitted to be confirmed by the appellate Court. Therefore, except reiterating the said observation of the trial Court, nothing further requires to interfere in the second appeal.

8. Accordingly, this second appeal is dismissed confirming the observation of the trial Court in respect of Ex.A.9 decree. The judgment and decree of the first appellate Court in A.S.No.121 of 1999, dated 22.03.2000, is confirmed. There is no order as to costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

cla

To

1.The II Additional District Judge,
Erode.

2.The Subordinate Judge,
Dhrapuram.

+1cc to Mr.S.Saravanan, Advocate, S.R.No.536

+1cc to M/s.B.Bagyalakshmi, Advocate, S.R.No.597

S.A.No.1926 of 2000

VD(CO)
CA(14/02/2017)

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